THE OWNERS OF THE SHIP "SHIN KOBE MARU"

v.

EMPIRE SHIPPING COMPANY INC.

HIGH COURT, AUSTRALIA
MASON C.J., BRENNAN, DEANE, DAWSON,
TOOHEY, GAUDRON & MCHUGH JJ.
[F.C.94/047]
9 NOVEMBER 1994

MARITIME LAW: *Claim for specific performance and order for sale on joint venture agreement - Whether proprietary maritime claim or general maritime claim - Whether claim relating to possession, title or ownership of a ship or a claim relating to possession, ownership, operation or earning of a ship - Section 4(2) and (6) Admiralty Act 1988.*

CONTRAT: *Joint venture agreement - Co-owners - Refusal to retransfer ship as agreed - Whether co-ownership includes equitable co-ownership - Whether equitable remedy of specific performance wrong in action in rem.*

PRACTICE & PROCEDURE*: Jurisdiction of Federal Court of Australia - Sections 10, 13 and 16 of Admiralty Act 1988.*

The respondent and Yamashita-Shinihon Steamship Co. Ltd. ("YSL"), both equal shareholders in United Transport Investment Incorporated, ("UTI"), on 18 September, entered into a joint-venture agreement providing, *inter alia*, that an ore carrier vessel (later named "Shin Kobe Maru") be constructed for Seven Seas Transport Incorporated ("Seven Seas", a wholly owned subsidiary of UTI and that the vessel shall not be "caused" to be sold within fifteen years after delivery.

By a further "flag change" agreement on 8 February 1984, YSL and the respondent's agent agreed that the vessel would be registered in Japan under YSL's name but *defacto* ownership would remain on 50/50 basis between YSL and respondent. It was also agreed that the joint venture would buy back the vessel through Seven Seas after July 1987.

The respondent sued the appellant *in rem* for wrongfully refusing to retransfer the vessel and sought an order for sale of the vessel, an order for transfer of shares and an order that ownership and possession be transferred to Seven Seas.

The appellant argued that the Federal Court Australia lacked jurisdiction as the claim was not a proprietary maritime claim within s. 4(2) (a) or (b) of the Admiralty Act 1988 and applied to set aside the writ or alternatively, the service of the writ.

The Federal Court refused the appellant's application and an appeal was made to the Full Court.

Held:

[1] The respondent's claim is an assertion of a contractual right to have Seven Seas put into ownership and possession of the vessel and therefore bears the legal character of a proprietary maritime claim under s. 4(2) (a) of the Admirably Act 1988. In their natural and ordinary meaning the words " a claim ...relating to ...ownership" is wide enough to encompass a claim that a third party is or has been or is entitled to become the owner and is not restricted to a claim as to one's own ownership.

[2] The words of s. 4(2)(a) and (b) of the Admiralty Act 1988 would not ordinarily be read to exclude a claim for specific performance or other equitable relief on the ground that the claim is a proprietary maritime claim brought *in rem* under admiralty jurisdiction.

Per Curium

Since the question of whether the respondent's claim is a proprietary maritime claim does not depend on findings of fact, the rule in "*The Arenticum*" that jurisdiction must be established on a balance of probabilities has no application.

[Appeal dismissed]

Cases referred to:

Empire Shipping Co. Inc. v. Owners of the Ship "Shin Kobe Maru" [1991] 104 ALR 489 ***(refd)***
Owners of the Ship "Shin Kobe Maru" v. Empire Shipping Co. Inc. [1992] 110 ALR 463 ***(refd)***
Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co. [1985] AC ***(refd)***
The "Antonis P. Lemos" [1985] 1 Lloyd's Rep 283 p. 286 ***(refd)***
Hohler v. Aston [1920] 2 Ch 420, approved in Beswick v. Beswick [1968] AC 58 ***(refd)***
Coulls v. Bagot's Executor and Trustee Co. Ltd. [1967] 119 CLR 460 ***(refd)***
Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd. [1988] 165 CLR 107 ***(refd)***
Tooheys Ltd. v. Commissioner of Stamp Duties (N.S.W.) [1961] 105 CLR ***(refd)***
The Bineta [1967] 1 WLR 121; [1966] 2 Lloyd's Rep 419 ***(dist)***
Antares Shipping Corp. v. The "Capricorn"[1979] 111 DLR (3d)289 ***(dist)***
Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd. [1978] 140 CLR 503 ***(refd)***
The "Two Ellens" [1872] LR 4 PC 161 ***(refd)***
The "Pieve Superiors" [1874] LR 5 PC 482 ***(refd)***
The "Rio Tinto" [1884] 9 App Cas 356 ***(refd)***
The "Henrich Bjorn" [1886] 11 App Cas 270 ***(refd)***
Police v. Thompson [1966] NZLR 813 ***(refd)***
Australian Softwood Forests Pty. Ltd. v. Attorney-General (N.S.W.); Ex rel. Corporate Affairs Commission [1981] 148 CLR 121 ***(refd)***
Slonim v. Fellows [1984] 154 CLR 505 ***(refd)***
FAI General Insurance Co. Ltd. v. Southern Cross Exploration N.L. [1988] 165 CLR 268 ***(refd)***
Knight v. F.P. Special Assets Ltd. [1992] 174 CLR 178 ***(refd)***
The Conoco Britannia [1972] 2 QB 543 ***(foll)***
Antares Shipping Corp. v. The "Capricorn" [1979] 111 DLR (3d) 289 ***(refd)***
Foong Tai & Co. v. Buchheister & Co. [1908] AC 458 at 467-468 ***(refd)***
De Lovio v. Boit [1815] 7 Fed Cas 418 at 441 (CCD Mass) ***(refd)***
People's Ferry Company of Boston v. Beers [1857] 61 US 393 ***(refd)***
Sisson v. Ruby 1990 111 L Ed 2d 292 p. 305 ***(refd)***
Reg v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [1964] 113 CLR 207 at 225 ***(refd)***
John Sharp & Sons Ltd. v. The Katherine Mackall [1924] 34 CLR 420 ***(refd)***
The "Ada" [1918] 250 Fed 194 (2d Cir) ***(refd)***
*Grand Banks Fishing Co. v. Styron [1953] 114 F Supp 1****(refd)***
Richard Bertram & Co. v. The Yacht "Wanda" [1971] 2 AMC 184)1 ***(refd)***
Grand Banks Fishing Co. v. Styron [1953] 114 F Supp 1 ***(refd)***
Richard Bertram & Co. v. The Yacht "Wanda" [1971] 2 AMC 184)1 ***(refd)***
Scalia J. in Sisson v. Ruby [1990] 111 L Ed 2d p. 305 ***(refd)***
The "Aventicum" [1978] 1 Lloyd's Rep 184 ***(dist)***
The "I Congreso del Partido" [1978] QB 500 at 535-537 ***(refd)***

Legislation referred to:

Admiralty Court Act 1861 (UK), s. 8
Admiralty Act 1988, ss.4(2) (a) (b), 5(2) (3) (4), 10, 12, 16, 17, 34
Supreme Court Act 1981 (UK) s. 21(2)
The Administration of Justice Act 1965 (UK)

Other sources referrred to:
Law Reform Commission's Report, op.cit. para. 15-16, 126
Commentaries on the Constitution of the United States, 5th ed. [1891], vol.2, ss.1665-1666
Ship-Sale Contracts, [1954] 6
Stanford Law Review 540 p. 545-546
Robertson, Admiralty and Federalism, [1970] p. 121
Gilmore and Black, The Law of Admiralty, 2nd ed. [1975] p. 26
Admiralty Law of the Supreme Court, 3rd ed. [1979]
Admiralty, 7th ed. [1989] p. 12.30
Admiralty Jurisdiction and Ship-Sale Contracts, [1954] 6
Stanford Law Review 540 p. 545-546
Benedict on Admiralty, op.cit. p. 12.32-12.35

For the appellant - Middletons Moore & Bevins
For the respondent - Norton Smith & Co.
For the intervener - Australian Government Solicitor

JUDGMENT

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron & McHugh JJ:
The "Shin Kobe Maru" ("the vessel") is a Japanese registered cargo ship engaged in international trade as an ore carrier, including trade with Australia. The vessel was built for Seven Seas Transport Incorporated ("Seven Seas"), a company incorporated in Liberia. It was originally registered in Liberia as the "Seven Seas Conqueror."

Seven Seas is a wholly owned subsidiary of United Transport Investment Incorporated ("UTI"), a company also incorporated in Liberia. The shares in UTI are owned equally by Navix Line Limited ("Navix"), a company incorporated in Japan, and Empire Shipping Company Inc. ("Empire") a company incorporated in Panama and the respondent to this appeal. Navix was previously known as Yamashita-Shinnihon Steamship Co. Ltd. ("YSL") and entered into the various transaction with which this case is concerned in that name. It is convenient to refer to Navix as if it were still YSL.

On 18 September 1975, Empire and YSL entered into a joint venture agreement which recited their agreement "to enter into and to jointly carry on the business of shipping". It also recited their shareholding in UTI, UTI's "establishment" of Seven Seas (although Seven Seas was in fact incorporated before UTI) and Seven Seas' agreement with a ship builder for the "construction and purchase of one ore carrier of about 116,000 tons". It further recited their willingness to execute the joint venture agreement "for the purposes of jointly own an ore carrier of about 116,000 tons".

The joint venture agreement made provision with respect to various matters concerning the ore carrier then being constructed for Seven Seas. In due course that ore carrier became the "Seven Seas Conqueror" and, later, the "Shin Kobe Maru". It was provided in Art.4 of the agreement that:

1. Neither party shall have the priviledge [sic] to cause [Seven Seas] to sell the vessel at its own discretion within first fifteen (15) years after the time of delivery of the vessel.

   ...

3. After expiration of the fifteen (15) years, YSL has the priviledge [sic] to cause [Seven Seas] to sell the Vessel at its own discretion. Any amount obtained from this sale shall be shared equally between both parties.

   ...

Until 1984, Empire and YSL apparently carried on their shipping business in accordance with the joint venture agreement, with Seven Seas registered as the owner of the Vessel. In 1984, they

decided that the vessel should be registered in Japan. On 8 February 1984, YSL and Van Shipping Co. Ltd. ("Van") apparently as the agent for Empire, executed a flag change agreement. Clauses 2 and 4 of that agreement provide:

> 2. In order to register the vessel into Japanese, YSL will nominally purchase the vessel at the price of the outstanding loan amount as of transfer of the vessel (approximate price is US$13,000,000) and YSL will hold full ownership under the Japanese Law. However even the period of the vessel being registered in Japan and owned by YSL, eventual ownership of the vessel still remains 50/50 basis between YSL and VAN and that any rights, obligations and liabilities under the JV Agreement also still remains as if JV Agreement dated 18 July 1975 (Apparently, the joint venture agreement between Empire and YSL of 18 September 1975, although referred to as "dated 18 Jul, 1975,) remains as it is.
>
> 4. Around July, 1987 when the original loan amount of about US$8,800,000 will be fully repaid, [Seven Seas] or other JVC (Apparently, "JVC" stands for "joint venture company) jointly and equally owned by YSL and VAN will buy back the vessel at the price of her book value remained in YSL at the time of transfer to JVC."

In due course, YSL became the owner and the vessel became registered as the "Shin Kobe Maru". Empire complains in these proceedings that the vessel has not yet been transferred to Seven Seas or another joint venture company.

The proceedings

These proceedings were commenced as an action *in rem* in the Federal Court in Australia in 1989. The writ, which was served while the vessel was in Australian waters, indicated that Empire's claim was based on "[the] joint venture agreement dated 18 September 1975 as subsequently amended on 8 February 1984". An appearance was entered for the limited purpose of challenging jurisdiction. Later, a statement of claim was filed on behalf of Empire. The statement of claim has since been amended.

By its amended statement of claim, Empire asserts, amongst other things, that the owners of the "Shin Kobe Maru" (meaning YSL) have "wrongfully refused to retransfer the "Shin Kobe Maru' to [Seven Seas] or to another joint venture company equally owned by Van .. for and on behalf [Empire] and [YSL]". It also asserts that its claim is a proprietary maritime claim as defined in s. 4(2)(a) and/or (b) of the Admiralty Act 1988 (Cth) ("the Act") and is within the jurisdiction of the Federal Court by reason of ss.10 and 16 of that Act. Section 10 confers jurisdiction on the Federal Court and the Supreme Courts of the Territories and vests jurisdiction in the Supreme Courts of the States "in respect of proceedings that may, under [the] Act, be commenced as actions *in rem*". Section 16 provides that "[a] proceeding on a proprietary maritime claim .... may be commenced as an action *in rem*".

The statement of claim seeks various orders, including:

> 1. An order for the sale of the vessel and that 50% of the sale proceeds be remitted to [Empire] or as the Court otherwise directs.
>
> 2. An order that all the shares in the vessel be transferred to [Seven Seas] or to another joint venture company equally owned by or on behalf of [Empire] and [YSL].
>
> 3. An order that ownership and possession of the vessel be transferred to [Seven Seas] or to another joint venture company equally owned by or on behalf of [Empire] and [YSL].

It is not in dispute that, if the claim that YSL wrongfully refused to retransfer the vessel to Seven Seas or another joint venture company is a proprietary maritime claim, other claims in the statement of claim are within the accrued or associated jurisdiction conferred by s.12 of the Act. Section 12 provides that:

> [t]he jurisdiction that a Court has under this Act extends to jurisdiction in respect of a matter of Admiralty and maritime jurisdiction not otherwise within its jurisdiction that is associated with a matter in which the jurisdiction of the Court under this Act is invoked.

YSL applied to have the originating process or, alternatively, service of the originating process set aside. It was put that Empire's claim was not a proprietary maritime claim within s. 4(2) (a) or (b) of the Act and, there being no other basis on which jurisdiction was asserted, the proceedings were beyond jurisdiction. At no stage of the proceedings did YSL argue that, if jurisdiction did exist, the Federal Court should in its discretion decline to exercise the jurisdiction.

YSL's application to set aside the originating process, or alternatively to set aside service, was refused. *Empire Shipping Co. Inc. v. Owners of the Ship "Shin Kobe Maru"* (1991) 104 ALR 489. An appeal to the Full Court was dismissed. *Owners of the Ship "Shin Kobe Maru" v. Empire Shipping Co. Inc.* [1992] 110 ALR 463. YSL now appeals to this Court. In the course of argument, application was made on behalf of Empire for leave to argue, for the first time, that its proceedings were properly brought as an action *in rem* because its claim is a general maritime claim (See s.4(3)) which satisfies s. 17 of the Act. (By s. 17 proceedings may be brought *in rem* on a general maritime claim if a person who would be liable on the claim in a proceeding commenced as an action *in personam*:

(a) was, when the cause of action arose, the owner or charterer, of, or in possession or control of, the ship or property; and

(b) is, when the proceedings is commenced, the owner of the ship or property".

Leave was refused ([1994] 68 ALJR 311; 120 ALR 12)

The legislative provisions

Subject to specified exceptions of no present relevance (see s.5(2), (3) and (4)) "[the]" Act applies in relation to:

(a) all ships, irrespective of the places of residence or domicile of their owners; and

(b) all maritime claims, wherever arising." (s.5(1)).

A maritime claim is either a proprietary maritime claim or a general maritime claim (s.4(1)). "[P]roprietary maritime claim" is defined in s.4(2) as follows:

A reference in this Act to a proprietary maritime claim is a reference to:

(a) a claim relating to:

(i) possession of ship;

(ii) title to, or ownership of, a ship or a share in a ship;

(iii) a mortgage of a ship or of a share in a ship; or

(iv) a mortgage of a ship's freight;

(b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;

(c) a claim for the satisfaction or enforcement of a judgment given by a Court (including a Court of a foreign country) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in Admiralty; or

(d) a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c).

The Act provides in s. 14 that, in matters of Admiralty or maritime jurisdiction, a proceeding cannot be commenced as an action *in rem* against a ship or other property except as provided by the Act. Section 15(1) confers the right to proceed *in rem* "on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge"; (Note that by s. 15(2) "maritime lien" includes "a lien for:

(a) salvage;

(b) damage done by a ship;

(c) wages of the master, or of a member of the crew, of a ship; or

(d) master's disbursements".)

as earlier noted, s. 16 confers the right to proceed *in rem* "on a proprietary maritime claim concerning a ship or other property"; s. 17 confers the right to proceed *in rem* on a general maritime claim which satisfies the requirements of that section as does s. 18 in the case of a general maritime claim which satisfies its provisions. Section 18 requires that a person who would be liable on the claim in a proceeding commenced as action *in personam*:

(a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and

(b) is, when the proceeding is commenced, a demise charterer of the ship.

The jurisdiction conferred by s. 10 of the Act is subject to the qualification contained in s. 13, which provides:

> This Act does not confer jurisdiction on a Court, or invest a Court with jurisdiction, in a matter that is not of a kind mentioned in paragraph 76(ii) or (iii) of the Constitution.

The matters mentioned in s. 76(ii) and (iii) of the Constitution are, respectively, matters "[a]rising under any laws made by the Parliament" and matters "[o]f Admiralty and maritime jurisdiction."

One other provision of the Act should be noted, namely, s. 6. That section provides:

The provisions of this Act (other than s. 34) do not have effect to create:

(a) a new maritime lien or other charge; or

(b) a cause of action that would not have existed if this Act had not been passed.

Section 34 creates causes of action for demanding excessive security and for unjustified arrest. It has no relevance to these proceedings.

History of the legislation

The Act reproduces the substance of draft legislation prepared by the Law Reform Commission ("the Commission") as part of its 1986 report, Civil Admiralty Jurisdiction. The report, which was made pursuant to a reference which required the Commission to review and report on "all aspects of the Admiralty jurisdiction in Australia", noted that there were then "many obscurities and uncertainties about the scope of the jurisdiction", (The Law Reform Commission, Civil Admiralty Jurisdiction (1986) , summary at xv; see also par.83) and that there was board recognition of the need

for reform. (See pars 83-86, 127-128, 135-136; see also the Attorney General's second reading speech on the Admiralty Bill 1988: House of Representatives, *Parliamentary Debates* (Hansard), 24 March 1988 at 1336). It went on to conclude that "Australian interests [were] best served by a widening or admiralty jurisdiction", noting, however, that there was no consensus "so far as the expansion of admiralty rights of arrest in respect of liabilities of charterers [was] concerned" (para.116).

One object of the Commission's draft legislation was "to strike a balance between following the English legislation and seeking to clarify and simplify the law" (par.95). The English legislation to which the Commission referred is the Supreme Court Act 1981 (UK) ("the UK Act"). So far as Admiralty matters are concerned, that Act repeats the substance of earlier legislation (The Administration of Justice Act 1965 (UK)) enacted to give effect in England to the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, Brussels, 1952 ("the Arrest Convention"). (See the discussion in *Gatoil International Inc. v. Arkwright Boston Manufacturers Mutual Insurance Co.* [1985] AC 255 at 263-264, 266 and in *The "Antonis P. Lemos"* [1985] 1 Lloyd's Rep 283 at 286).

Although there are some differences, pars (a)(i) and (ii) and (b) of the definition of a "proprietary maritime claim" in s. 4(2) of the Act are based on pars (a) and (b) of s. 20(2) of the UK Act which relate, respectively, to "any claim to the possession or ownership of a ship or to the ownership of any share therein" and "any question arising between the co-owners of a ship as to possession, employment or earnings of that ship." By s. 21(2) of the UK Act, actions with respect to those matters may be brought *in rem*. The Commission's Report does not explain why claims relating to "possession" or "ownership" of a ship are included in both par.(a) and par.(b) of s. 4(2) of the Act, while claims relating to "title" are confined to para.(a). There are obvious similarities with pars (o) and (p) of Art.1(1) of the Arrest Convention which relate, respectively, to "disputes as to the title to or ownership of any ship" and "disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship".

The issues

The primary submission for YSL is that, even if s. 4(2) (a) (i) and (ii) and (b) are not read down pursuant to s. 13 of the Act, Empire's claim is not a proprietary maritime claim as defined in those paragraphs. The submission involves three separate arguments. The first is that Empire's claim is neither "a claim relating to ... possession of a ship [or] ... title to, or ownership of, a ship" nor "a claim ... relating to the possession, ownership operations or earnings or the ship" because, when read in context, those words in s. 4(2) (a) and (b) refer to a claim by which a plaintiff asserts its own right to possession, title or ownership, not that of a third party. The second is that a proprietary maritime claim as defined in s. 4(2) (a) and (b) does not extend to a claim for specific performance. The third argument is that the concept of ownership, as used in s. 4(2), does not extend to equitable ownership. In the present case, Empire's claim is that YSL wrongfully refused to retransfer the vessel to Seven Seas or another joint venture company. The claim thus asserts a contractual right rather than any claimed equitable interest of Empire. That being so, YSL's third argument is relevant to s. 4(2) (b) only; it was put that "co-owners", as used in that paragraph, does not extend to equitable co-owners.

The second submission for YSL is that, if Empire's claim otherwise comes within s. 4(2)(a) or (b), the provisions, or, the provision within which the claim falls, must be read down by reason of s. 13 so that they do not exceed s. 76(iii) of the Constitution.

The third and final submission for YSL is that the Federal Court erred in not requiring Empire "to show, on the balance of probabilities, that its claim was within jurisdiction."

The meaning of "a claim ..... relating to ... ownership" in s. 4 (2)(a) and (b)

The argument that s. 4(2)(a) and (b) are confined to claims by which a plaintiff asserts its own title, ownership or right to possession can be approached by reference to the expression "a claim ... relating to .. ownership". The considerations which apply to "ownership" in s. 4(2)(a) and (b) apply equally to "title" and "possession" and vice versa. Note that the word "title" does not appear in s. 4(2)(b). And no issue arises with respect to "operations or earnings" in s. 4(2)(b), the case having been argued, at least in this Court, solely by reference to ownership, title and possession.

In their natural and ordinary meaning,the words "a claim ... relating to .. ownership" are wide enough to encompass a claim that a third party is or has been *(The "Lady of the Lake"* (1870) LR 3 Adm Ecc 29) or is entitled to become the owner of the property in question. In this regard, the expression "a claim .. relating to ... ownership" may be contrasted with "a claim to ownership" or "a claim for ownership", which latter expressions would ordinarily indicate a claim as to one's own ownership, not that of another. For a discussion of the difference, see *Gatoil International Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co.*[1985] AC at 270-271. And although plaintiffs do not usually bring proceedings to benefit another such proceedings are not entirely unknown. Thus, for example, proceedings have been brought on a contract for the purchase of property to be conveyed as a gift to a third party. See, for example,*Hohler v. Aston*[1920] 2 Ch 420, approved in *Beswick v. Beswick* [1968] AC 58 at 82, 89, 99-100; and see the discussion in *Coulls v. Bagot's Executor and Trustee Co. Ltd.*(1967) 119 CLR 460 at 478, 503, discussed with approval in*Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.*(1988) 165 CLR 107 at 119-120, 138, 158 and 173.

It was argued for YSL that the expression "a claim .. relating to ... ownership" should be read down by reason of its statutory context and in light of the practice and general principles of Admiralty. As to the context in which the words "relating to" appear, see for example, *Tooheys Ltd. v. Commissioner of Stamp Duties (N.S.W.)*(1961) 105 CLR at 618, 620. The argument based on the statutory context relied on the Act's description of a claim falling within s. 4(2) as "a**proprietary** maritime claim" and on s. 6 which, as earlier noted, provides that, s. 34 apart, the Act does not create any new maritime lien or other charge and does not create any new cause of action. The argument based on practice and general Admiralty principles proceeded largely on the basis that there is no reported case, or none that could be found, involving the exercise of jurisdiction in an action *in rem* where the plaintiff asserted not its ownership, but that of a third party. It was said, correctly, that although an expansive view was taken as to the nature and extent of the jurisdiction in *The Bineta* [1967] 1 WLR 121; [1966] 2 Lloyd's Rep 419 and in *Antares Shipping Corp. v. The "Capricorn"*[1979] 111 DLR (3d)289, in neither case did the plaintiff assert the ownership of a third party.

The Act's description of a claim falling within s. 4(2) as a "proprietary maritime claim' is of no assistance is construing the expression "a claim ... relating to ... ownership". The use of the word "proprietary" in the term to be defined does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined. See*Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd.*[1978] 140 CLR 503.

Nor does s. 6 bear on the meaning of "a claim .. relating to ... ownership" in any way that requires that expression to be read as excluding Empire's claim. A construction which allows a plaintiff to enforce its contractual rights by a action *in rem*, even though those rights involve or result in another's ownership, neither effects a new maritime lien or other charge nor creates a new cause of action contrary to s. 6. It has long been accepted that the mere conferral by statute of a right to proceed *in rem* on an existing cause of action does not effect a new maritime lien or charge. See

The "Two Ellens" [1872] LR 4 PC 161; *The "Pieve Superiors"* (1874) LR 5 PC 482; The *"Rio Tinto"* [1884] 9 App Cas 356; The *"Henrich Bjorn"* [1886] 11 App Cas 270; and the Law Reform Commission's Report, op.cit. at pars 15-16, 126. And where, as here, proceedings are brought on a contract, the cause of action arise under the contract, not under the Act. The position can be illustrated by reference to the rights conferred by ss. 17 and 18 of the Act. Where the requirements of those sections are satisfied, a "general maritime claim" of the kind referred to in s. 4(3) of the Act is neither elevated to the status of a maritime lien nor transformed into a new cause of action by reason of the right to proceed *in rem:* the claim and the cause of action remain the same; the Act enables proceedings to be brought *in rem* but it does not alter the nature or incidents of the claim or of the cause of action. See, to like effect, *The "Henrich Bjorn"* [1886] 11 App cas at 278 per Lord Watson.

Nor is it possible to construe s. 4(2)(a) and (b) by reference to the practice and principles applied in Admiralty matters before the Act was passed. As earlier indicated the Act was intended to reform the law with respect to the Admiralty jurisdiction. And it was intended to strike a balance which would bring the jurisdiction more closely into line with that conferred by the UK Act and, thus, more closely into line with the practice and principles adopted in the Arrest Convention.

Not only do the matters upon which the argument for YSL relied not support the construction for which it contends, but two other matters tell strongly against a reading down of s. 4(2)(a) and (b). The first and more significant is that a statutory definition should be approached on the basis that Parliament said what it meant and meant what it said. The consequence of that is that a definition should be read down only if that is clearly required. See *Police v. Thompson* [1966] NZLR 813 at 818 as, for example, if it is necessary to give effect to the evident purpose of the Act. See *Australian Softwood Forests Pty. Ltd. v. Attorney-General (N.S.W.); Ex rel. Corporate Affairs Commission* [1981] 148 CLR 121 at 130 per Mason J. See also *Slonim v. Fellows* [1984] 154 CLR 505 at 513 per Wilson J. The second is that s. 4(2)(a) and (b) form part of a jurisdictional definition, in the sense that the definition of "proprietary maritime claim" serves to identify an area of jurisdiction conferred on or vested in the Courts referred to in s. 10 of the Act. It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a Court by making implications or imposing limitations which are not found in the express words. See *FAI General Insurance Co. Ltd. v. Southern Cross Exploration N.L.* [1988] 165 CLR 268 at 283-284, 290. See also *Knight v. F.P. Special Assets Ltd.* [1992] 174 CLR 178 at 185, 202-203, 205.

There is no indication in the express words of s. 4(2)(a) and (b), much less a clear indication, that the expression "a claim...relating to...ownership" of a ship should be read down in a way that would exclude a claim by which a plaintiff asserts rights which involve or may involve another's ownership. The argument to that effect must be rejected.

The claim for specific performance

The argument that s. 4(2)(a) and (b) do not extend to claims for specific performance was developed by contrasting equitable principles, particularly the principle that equity acts *in personam*, with those which apply in Admiralty. It was said that "a claim for specific performance *in rem* is a contradiction in terms" and that s. 4(2)(a) and (b) should be construed to avoid a contradiction of that kind.

The argument that a claim for specific performance falls outside s. 4(2)(a) and (b) is one that appears, at least at first sight, to confuse jurisdiction, or the authority to entertain a claim, with the powers or remedies available for its final disposition. Specific performance is a discretionary remedy and

may be refused for a variety of reasons, no matter the description of the jurisdiction being exercised. Given that s. 4(2)(a) and (b) are concerned with claims that bear the legal character there specified, it would be surprising if authority to entertain such claims should depend on whether or not the plaintiff sought a form of relief which, even if the claim were established, might not be granted. Of course, the owner of the *res* might not enter an appearance. If that occurred, then, as Brandon J. pointed out in *The Conoco Britannia* [1972] 2 QB 543 at 554-555, an order for specific performance or some other *in personam* relief might be unenforceable. In that case, the Court might refrain from making the order sought. However, that would mean no more than that, in the exercise of its jurisdiction, the Court had declined on discretionary grounds to provide a remedy that was available to it. That being so, the argument that a claim for specific performance is outside s. 4(2)(a) and (b) must be evaluated according to ordinary principles of statutory construction, rather than by contrasting the historical and jurisprudential differences between remedies *in rem* and remedies *in personam.*

The purpose of the Act is to vest and confer jurisdiction with respect to maritime claims as defined in s. 4, subject to certain specified limits, and to permit the arrest of a ship or other property in proceedings properly commenced as an action *in rem* (s. 22). And subject to s. 33, which empowers the Court to make orders for sale and for settlement of accounts in proceedings between co-owners, and to s. 34, which provides for damages for unjustified arrest, the Act is not concerned to prescribe the remedies available for the disposition of those claims.

Given that the Act is primarily concerned with jurisdiction and that it deals with remedies only to extend them in the ways indicated, the word "claim" in the definition of "proprietary maritime claim" and "general maritime claim" would ordinarily be construed as the assertion of a right or interest recognized by the law and carrying an entitlement to relief. It would not ordinarily be read as confined to claims for particular relief or, even, relief of a particular kind. Similarly, it would not ordinarily be read as excluding claims to particular relief or relief of a particular kind. More particularly, it would not ordinarily be read as excluding a claim for specific performance or for other equitable relief.

For the reasons given earlier with respect to the words "a claim...relating to...ownership", the meaning ordinarily to be given to a statutory definition should be limited only if that is clearly required. There is nothing to indicate that "claim" should be given a narrower meaning than that indicated above. Nor is there anything to suggest that it should be read as subject to an exclusion which its terms do not require. It follows that if a claim satisfies the terms of s. 4(2)(a) or (b) of the definition of "proprietary maritime claim", it is a claim which can be brought *in rem* notwithstanding that the claim involves the further assertion that the appropriate remedy is specific performance or, indeed, some other remedy that has its origins in equity, rather than in Admiralty.

It may be noted that the Supreme Court of Canada considered a similar argument with respect to specific performance in *Antares Shipping Corp. v. The "Capricorn"* [1979] 111 DLR (3d) 289 and held that the words "any claim as to title, possession or ownership of a ship" extended to a claim for specific performance and that historical considerations did not dictate to the contrary.

The meaning of "co-owners" in s. 4(2)(b) of the Act

As Empire's claim falls within the terms of s. 4(2)(a) and as we have formed the view, for reasons which appear later, that s. 13 does not require that paragraph to be read down in any way affecting the claim, it is not strictly necessary to deal with the contention, made by reference to the word "ownership", that "co-owners" in s. 4(2)(b) does not extend to equitable co-owners. However, given the principles to be applied in construing a definition, particularly one which marks out jurisdiction, and given that the Act applies to "all ships, irrespective of the places of residence or

domicile of their owners" (s. 5(1)(a)) and to "all maritime claims, wherever arising" (s. 5(1)(b)), it is wrong to approach the Act on the basis that it is concerned only with title and ownership as recognized by the common law and not with equitable interests. Indeed, in *Foong Tai & Co. v. Buchheister & Co.* [1908] AC 458 at 467-468, the Privy Council observed that s. 8 of the Admiralty Court Act 1861 (UK) which conferred jurisdiction "to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship" seemed wide enough to extend to equitable co-owners.

Matters of Admiralty and maritime jurisdiction in s. 76 (iii) of the Constitution

It was submitted on behalf of YSL that a claim for "the vindication *in rem* of a third party's title is repugnant to the whole conception of admiralty jurisdiction", as is "specific performance*in rem*". It was said that it follows that neither claim is a matter of "Admiralty and maritime jurisdiction" within s. 76(iii) of the Constitution, even if those words are interpreted as extending beyond the matters which were within Admiralty jurisdiction in 1901.

It has long been accepted in the United States that the word "maritime" in the Constitutional expression "Cases of admiralty and maritime Jurisdiction" in Art.III s. 2(1), on which our s. 76 (iii) was modelled, serves to extend the jurisdiction beyond those matters which, historically, fell within the Admiralty jurisdiction of the United Kingdom. See Story's 1833 **Commentaries on the Constitution of the United States**, 5th ed. [1891], vol.2, ss.1665-1666. It is accepted that the composite phrase "admiralty and maritime" was intended to extend the jurisdiction to matters of the kind regarded by the maritime nations of Europe as falling within the special jurisdiction of their Courts as to "maritime contracts and concerns". (*De Lovio v. Boit* [1815] 7 Fed Cas 418 at 441 (CCD Mass); see also at 442-443). In consequence, the admiralty and maritime jurisdiction of the United States extends to contracts "touching rights and duties appertaining to commerce and navigation". (*People's Ferry Company of Boston v. Beers*[1857] 61 US 393 at 401. See also story's*Commentaries on the Constitution of the United States,* op. cit., s. 1666; and*Sisson v. Ruby* (1990 111 L Ed 2d 292 at 305).

Ordinary principles of constitutional construction, which require constitutional provisions to be interpreted liberally according to their terms without imposing limitations that are not found in the express words See (*Reg v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd.*[1964] 113 CLR 207 at 225) compel the conclusion that "maritime" in s. 76 (iii) serves to extend jurisdiction beyond Admiralty jurisdiction as it existed in 1901. And quite apart from the course of constitutional interpretation of Art. III s. 2(1) of the United States Constitution, and notwithstanding what was said by Isaacs J. in *John Sharp & Sons Ltd. v. The Katherine Mackall* [1924] 34 CLR 420 at 428 to the effect that s. 76 (iii) was predicated on "established English precedent", those same ordinary principles direct an approach which allows that s. 76(iii) extends to matters of the kind generally accepted by maritime nations as falling within a special jurisdiction, sometimes called Admiralty and sometimes called maritime jurisdiction, concerned with the resolution of controversies relating to marine commerce and navigation.

The terms of the Arrest Convention show that a claim that has the legal character specified in s. 4(2)(a) or(b) of the Act, even if those provisions are construed in favour of jurisdiction in this case, is of a kind that is generally accepted by maritime nations as within the special jurisdiction of their Courts concerned with matters relating to marine commerce and navigation. That being so, and unless there is some compelling reason to depart from ordinary principles of constitutional interpretation, a claim of that kind falls within s. 76 (iii) of the Constitution.

An attempt was made, by analogy with the position in the United States, to justify a more limited operation for s. 76(iii) than its words would ordinarily indicate. It has been held in the United States that admiralty and maritime jurisdiction does not extend to contracts for the construction (See

people's Ferry Company of Boston v. Beers [1857] 61 US 393; and see the cases cited in **Benedict on Admiralty,** 7th ed. [1989] at 12.30, n.3.) or sale (See *the "Ada"* [1918] 250 Fed 194 (2d Cir); *Grand Banks Fishing Co. v. Styron* [1953] 114 F Supp 1; *Richard Bertram & Co. v. The Yacht "Wanda"* [1971] 2 AMC 184)1 of ships. The decisions to that effect have been much criticized (see for example, comment, "Admiralty Jurisdiction and Ship-Sale Contracts", [1954] 6 Stanford Law Review 540 at 545-546; Robertson, **Admiralty and Federalism**, [1970] at 121; Gilmore and Black, **The Law of Admiralty,** 2nd ed. [1975] at 26, n.88 ("vague...artificial inconsistent") and 30 (exclusion of ship-building contracts "pretty clearly wrong"); Baer, **Admiralty Law of the Supreme Court**, 3rd ed. [1979] at 465-466 ("In brief, admiralty jurisdiction will attach if a majority of the Court chooses to classify the contract as maritime."); **Benedict on Admiralty,** op.cit. at 12.32-12.35,) including in the separate opinion of Scalia J. in *Sisson v. Ruby* [1990] 111 L Ed 2d at 305 where it was said that "[t]he impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself `maritime', has brought ridicule upon the enterprise."

The US position with respect to contracts for the sale of ships seems to have been reached by analogy with ship-building contracts (See the discussion of *The "Ada"* [1918] 250 Fed at 198 (2d Cir) in "Admiralty Jurisdiction and Ship-Sale Contracts", [1954] 6 *Stanford Law Review* at 545, n.38. See also *Benedict on Admiralty*, up.cit at 12.34). It was said in *People's Ferry Company of Boston v. Beers* [1857] 61 US at 402 that a ship-building contract was not within admiralty and maritime jurisdiction because the contract was "made on land, to be performed on land". There seems to us to be more logic in that approach than in an approach that would exclude a claim from s. 76 (iii) simply because it or some aspect of it might protect the rights of a third party or because it might result in relief by way of specific performance. However, it is unnecessary to express a view as to the applicability to this country of those US decisions holding that admiralty and maritime jurisdiction does not extend to contracts for the construction or sale of ships.

Clearly, a claim will only result in the protection of the rights of a third party if the third party's rights are connected in some way with the rights of the parties to the proceedings. And that connection will result, if at all, from their contractual or business arrangements. Arrangements of that kind may be unusual, but that provides no basis for excluding from s. 76(iii) of the Constitution a claim which results or might result in the protection of the rights of a third party. And once it is accepted that "maritime" in s. 76 (iii) serves to equate the jurisdiction there referred to with that of maritime nations generally, there is no basis for any qualification or limitation based on jurisdictional divisions peculiar to English law, which is the only basis on which it could be argued that there should be a limitation in the case of a claim for specific performance. There is thus no basis for applying s. 13 of the Act in a way which results in a reading down of s. 4(2)(a) and (b) in the manner for which YSL contends.

Standard of proof and jurisdictional facts

The argument that Empire was required "to show, on the balance of probabilities, that its claim was within jurisdiction" was made by reference to the decision in *The "Aventicum"* [1978] 1 Lloyd's Rep 184. That case was concerned with jurisdiction under s. 3(4) of the Administration of Justice Act 1956 (UK) which operated in a manner similar to that in which ss. 17 and 18 of the Act now operate. The effect of s. 3(4) in that case was that jurisdiction existed if the person against whom the Admiralty jurisdiction was invoked was "the person who beneficially own[ed] all shares and...the same person..was the owner at the time the cause of action arose" (*ibid.* at 186). Much the same question arose in *The "I Congreso del Partido"* (see [1978] QB 500 at 535-537). The effect of the decisions in the latter case and in *The "Aventicum"* was that jurisdiction had to be determined

as a preliminary issue and on the balance of probabilities.

Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction.

In this case, Empire asserts jurisdiction on two bases. So far as jurisdiction is asserted by reason of s. 4(2) (a), it does not depend on any factual precondition but, rather, on the claim having the legal character required by that paragraph, namely, "a claim relating to..possession of [or]..title to, or ownership of, a ship". The position is somewhat different with s. 4(2) (b) in that ownership is a question of mixed fact and law and there may well be cases where facts must be established before a claim can be characterized, in terms of that paragraph, as "a claim between co-owners". However, the issue in this case, so far as s. 4(2) (b) is concerned, seems not to be whether Empire has established facts proving co-ownership, but whether the facts give rise to a relationship which is recognized in law as co-ownership. These issues were not fully developed in argument and, as earlier indicated, it is not necessary to determine whether s. 4(2) (b) applies in this case. That being so, it is convenient to consider this aspect of YSL's argument solely by reference to s. 4(2)(a).

The question whether Empire's claim bears the legal character of a proprietary maritime claim as defined in s. 4(2)(a) of the Act does not depend on findings of fact and, thus, cannot involve any consideration of the balance of probabilities. That being so, there is no basis for the application of the principle in *The "Aventicum"* in relation to Empire's claim that there is jurisdiction by reason of s. 4(2)(a).

Conclusion

Empire's claim, which may be described as the assertion of a contractual right to have Seven Seas or another joint venture company put into ownership and possession of the vessel, bears the legal character of a proprietary maritime claim as defined in s. 4(2) (a) of the Act. Accordingly, the appeal must be dismissed.

If Empire still wishes to rely on s. 17 of the Act, it is for the Federal Court to decide whether and, if so, on what terms that should be allowed.